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No. 97-1843

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

KELLER COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, THE CITY OF LEWISVILLE, TEXAS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Communications Commission properly waived one of its application processing policies to correct a frequency coordination mistake made outside the control of an otherwise innocent public safety agency applicant to carry out its statutory obligation to promote public safety.

LIST OF PARTIES

Respondent City of Lewisville, Texas concurs in the listing of the parties to the proceeding contained in the petition for a writ of *certiorari.*

STATEMENT REQUIRED BY RULE 29.6

The City of Lewisville, Texas is a governmental municipality and thus not a corporation. Accordingly, there is no parent or subsidiary company to be listed.

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The City of Lewisville, Texas ("Lewisville") hereby opposes the petition for a writ of *certiorari* ("Petition") to the United States Court of Appeals for the District of Columbia Circuit filed by Keller Communications, Inc. ("KCI").

It is apparent even from KCI's Petition alone that there are no compelling reasons for grant. First, KCI does not allege that there are any conflicts with Supreme Court case law. Second, a decision in this case will not resolve any circuit conflicts. Finally, this case does not raise any constitutional issues or issues of national importance.

Simply put, the case merely involves a Federal Communications Commission ("FCC" or "Commission") decision to waive

its own processing policies because (1) the applicant was a completely innocent filer who was given incorrect information from the FCC's certified frequency coordinator upon which it relied; (2) the waiver served an important public purpose by allowing a Texas community's emergency services to have sufficient internal communications; and (3) KCI, the only competing applicant, made untimely filings for the frequency and was going to use it for purely commercial purposes in any event.

KCI's assertion that the FCC impermissibly created a *de facto* irrebuttable preference for public safety entities over commercial applicants is simply not borne out by the decision and even if it were true would be consistent with the agency's Enabling Act. In reality, important public safety issues were involved here and were fully credited by the agency not only because such a position was authorized by statute, but the public interest demanded it. The waiver was granted to Lewisville, which is a municipality responsible for ensuring the provision of police, fire, emergency medical, disaster recovery and rescue assistance to its citizens. Furthermore, the license was to be used by this municipality pursuant to joint agreements to serve the emergency communications needs of Lewisville and nearby communities in a mutually beneficial way.

OPINIONS BELOW

Respondent City of Lewisville, Texas concurs in the listing of the opinions and orders below contained in the petition for a writ of *certiorari*.

JURISDICTION

Respondent City of Lewisville, Texas concurs in the statement of jurisdiction contained in the petition for a writ of *certiorari*.

STATUTES OR OTHER PROVISIONS INVOLVED

The statutes and other provisions involved are set out in the attached appendix.

COUNTERSTATEMENT OF THE CASE

In October 1992, Lewisville and Flower Mound entered into a mutually beneficial "Interlocal Agreement" whereby Flower Mound agreed to assign its single conventional 800 MHz channel to Lewisville. Under this agreement, Lewisville agreed to add this channel to its existing trunked system, and to relocate the entire system to a new tower that would provide emergency radio services covering all of Lewisville and Flower Mound.[1] This 800 MHz system supports hand held and vehicle mounted mobile transmitting equipment providing two-way voice and data communications for emergency personnel.

The benefits of this agreement were enormous to both parties. Flower Mound was able to achieve full radio coverage of the town for its public safety organizations, and with the addition of the subject channel to its trunked system, Lewisville was able to substantially increase the capacity of its public

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[1] A "conventional" channel is one that is shared by all users and is available to only one mobile unit at a time, while the more efficient "trunked" system utilizes multiple channels which automatically selects an open channel for use in transmitting a call. As more channels are added to a trunked system, progressively more mobile units can be added to the system while still retaining the capacity to handle simultaneous calls and avoid "busy" signals.

safety radio system and resolve the dangerously overloaded condition of the radio network.

In addition, Lewisville and Flower Mound were able to pool their limited financial resources together to establish the emergency communications system needed for the protection of their citizens. Also, the shared network between the two public safety entities allows interagency communications in the event of mutual aid or wide-area disaster circumstances.

In furtherance of the Interlocal Agreement, Lewisville submitted an application with the FCC to convert Flower Mound's channel to Lewisville's trunked system. Through no fault attributable to Lewisville, the certified frequency coordinator failed to account for the existence of a co-channel licensee ("Greene"). The Commission initially granted the application also without detecting the existence of that co-channel licensee. Although the co-channel license had been automatically forfeited due to failure to construct, under FCC policy this license should have been deleted from the Commission's database prior to the filing of an application for that channel.

After discovering the error, the Commission ultimately waived its policy when it discovered Greene's license should be deleted from the database because he had forfeited the license by failing to construct. Lewisville had attempted to comply with all processing rules in good faith and had an important public purpose for the frequency. Moreover, KCI's subsequently filed commercial use applications were never acceptable filings under the Commission's rules.

The Court of Appeals for the District of Columbia Circuit unanimously affirmed the Commission's order. The full court summarily denied KCI's petition for rehearing and suggestion for rehearing *en banc*.

Pursuant to Supreme Court Rule 15.2, Lewisville lists below the litany of misstatements of fact and law contained in KCI's Petition in order to correct the record:

- KCI's description of the Interlocal Agreement, KCI Pet. at 3, as the provision of "dispatch service to Flower Mound at commercial rates" is wrong and misleading. KCI incorrectly attempts to draw a comparison between the type of commercial, for-profit services it offers to the public with the government-run, public safety trunked system operated for Lewisville's and Flower Mound's benefit.

- Contrary to KCI's statements, KCI Pet. at 3, the application filed by Lewisville with the FCC's authorized frequency coordinator was entirely proper in all substantive and procedural respects.

- With regard to the return of Lewisville's application to pending status, KCI misstates the law on this issue by stating that the application was required to be returned as defective. KCI Pet. at 3. Actually, under the Commission's rules,[2] the FCC may return an application to pending status, and if that application is resubmitted within 60 days, the application retains its original position in the processing line.

- KCI's characterization of how Lewisville learned of the finder's preference request denial is a misstatement of the facts. Contrary to KCI's statement, Lewisville was not "immediately informed by telephone and prompted to refile its application." KCI Pet. at 3. What did occur was nothing more than an interested applicant communicating with the Commission to obtain the status of a filing bearing directly on its own.

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[2] 47 C.F.R. §§ 90.141, 90.611(f) [1992].

- KCI misstates the law when asserting that Lewisville's resubmitted application should have been submitted again through the frequency coordinator. KCI Pet. at 4. The Commission's rules do not specifically address whether or not frequency coordination is required for the resubmission of applications returned to pending status. In practice, the FCC routinely accepts resubmitted applications without frequency coordination where in cases such as Lewisville's no purpose at all would be served by such an exercise. The one outstanding frequency coordination issue, the failure to account for the Greene license, was obviously resolved making any new frequency coordination unnecessary.

- KCI's statement that "both Flower Mound and Lewisville already held a variety of licenses for multiple channels (indeed, they have both received additional licenses since the commencement of this litigation)" is false and misleading in that KCI is attempting to suggest that the holding of any of these licenses somehow mitigates the need for the grant of the subject license. KCI Pet. at 4. The "variety of licenses" referred to by KCI consists of frequencies in other bands held by Lewisville or Flower Mound that are mostly paging channels and completely incompatible with the two-way, voice and data 800 MHZ trunked system. Furthermore, these licenses are utilized by non-emergency related agencies such as the Parks department, with older equipment, lower power and smaller ranges of operation which are entirely unsuitable for wide area emergency communications.

REASONS FOR DENYING THE WRIT

This case does not involve either a conflict with Supreme Court case law or a conflict among circuits. The only constitutional issue which has been raised was never mentioned below and in any event has no merit. The waiver decision below turns upon its own unique facts which demonstrate that the FCC acted well within its discretion and that public safety was an important factor, but hardly the only one.

The Commission was faced with a unique factual situation whereby Lewisville, through no fault of its own, experienced a hapless chain of mistakes by the Commission's certified frequency coordinator and by the FCC itself. These mistakes eventually threatened to deny the municipalities the ability to fulfill wireless emergency communications needs, thereby seriously endangering their ability to protect the public safety.

KCI is plainly wrong regarding the basic premise of its argument. This is not a case of a *de facto* irrebuttable preference for a public sector applicant over a competing private sector applicant as KCI would like to believe. KCI Pet. at 4-5. Quite the contrary, what this case is about is the Commission waiving a policy, as applied only to Lewisville based on the unique facts involved, to ensure that the emergency communications needs of a public safety agency applicant were properly considered as the Commission is required to do under the Communications Act. KCI is not a competing applicant with Lewisville in the sense that they are rival competitors in the provision of communications services. Lewisville is using its license to serve its needs and those of nearby communities in a mutually beneficial way.

The Commission clearly has the authority to waive its own rules for "good cause." 47 C.F.R. § 1.3. Congress has

specifically directed the Commission to take into account the special needs of public safety and governmental agencies. One of the enumerated purposes of the Communications Act is "to make available . . . a radio communications service . . . for the purpose of promoting safety of life and property." 47 U.S.C. § 151.

Furthermore, Section 332 of the Act specifically requires the Commission to consider, *inter alia*, the promotion of the safety of life and property in taking actions to manage the spectrum for use by the private land mobile services. 47 U.S.C. § 332(a)(1). Importantly, in the accompanying Conference Report, Congress elaborated on § 332(a)(1):

> [t]he Commission should be ever vigilant to promote the private land mobile spectrum needs of police departments and other public agencies which need to use such radio services to fulfill adequately their obligations to protect the American public. The Conferees are particularly concerned about radio services which are necessary for the safety of life and property and urges the Commission to carefully consider the legitimate needs of public safety agencies in managing the private land mobile spectrum.

H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 52-53 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2261, 2296-2297.

Thus, the Commission's discretion to act in the public interest to meet the needs of public safety entities is very broad. Certainly, on the unique facts presented here, the Commission acted well within its discretion to waive its database deletion policy in order to protect the public safety communications needs of the affected communities. Given Congress' direction regarding public safety concerns, the FCC correctly considered the impact on public safety as a factor in its decision, with the mistakes made by entities outside of Lewisville's control.

KCI argues that it was not provided advance notice of the Commission's intent to grant a waiver, thus depriving KCI of Due Process. KCI Pet. at 6. As an initial matter, KCI raises this issue for the first time. This Court has previously held that issues raised before the Court must be raised in the court of appeals first. *EEOC v. Fed. Labor Relations Auth.*, 476 U.S. 19 (1986). Furthermore, as a condition precedent to seeking review of an FCC decision, section 405 of the Communications Act requires a party seeking review to rely only on those questions of fact or law that the Commission had an opportunity to pass. 47 U.S.C. § 405(a).

In any event, this claim is based on a faulty premise. The Commission did not adopt the *de facto* public safety policy KCI alleges. The Commission acted well within its statutory authority in granting the waiver, and KCI cannot now "boot-strap" a Due Process claim into its baseless claim of the adoption of a policy never actually adopted.

The FCC did not establish a *de facto* preference favoring public safety entities in all situations generally, but instead made a reasonable determination in a unique factual setting under its broad statutory discretion to weigh public safety factors when managing the spectrum. As the Court of Appeals held, the waiver was well within the Commission's authority and the Commission had ample reason to protect public safety. KCI Op. at B-7. Even had the agency adopted such a preference, it would be well within its statutory discretion.

CONCLUSION

For the foregoing reasons, there is no issue worthy of Supreme Court review, and KCI's petition for writ of *certiorari* should be denied.

Respectfully submitted,

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APPENDIX

47 U.S.C. Section 151:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nationwide and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

47 U.S.C. Section 332(a):

(a) In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with Section 1 of this Act, whether such actions will --

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

47 U.S.C. Section 405(a):

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under Section 5(c)(1), any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority, making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under Section 5(c)(1), in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: provided, that in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence

other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which Section 402(a) applies, or within which an appeal must be taken under Section 402(b) in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

47 C.F.R. §1.3:

The provisions of this chapter may be suspended, revoked, amended or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.

47 C.F.R. §§ 90.141 [1992]:

Any application that has been returned to the applicant for correction will be processed in original order of receipt if it is resubmitted and received by the Commission's offices in Gettysburg, PA within 60 days from the date on which it was returned to the applicant. Otherwise, it will be treated as a new application and will require an additional fee as set forth in Part 1, Subpart G of this chapter.

47 C.F.R. §§ 90.611(f) [1992]:

If an application is returned for correction and resubmitted and received by the Commission within 60 days from the date on which it was returned to the applicant, it will retain its place in

the processing line. If it is not received within 60 days it will lose its place in the processing line.